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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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February 22, 1993

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REPLY BRIEF OF PETITIONER

Petitioner John Hancock Mutual Life Insurance Company ("Hancock")[1] submits this Reply Brief in response to the Brief in Opposition to the Petition for a Writ of Certiorari filed by Respondent Harris Trust and Savings Bank ("Harris Trust").[2]

[1] The list of Parties provided in the Petition pursuant to Rule 29.1 continues to be correct as of the date hereof.

[2] References to pages of the Petition and of the Brief in Opposition are cited as "Pet." and "Opp. Br.", respectively, followed by the page number. References to pages of the Appendix to the Petition are cited herein as "A-", followed by the page number.

The Brief in Opposition does not in any way contradict Hancock's statement of the compelling reasons for granting the writ. It concedes that the Second Circuit's decision has caused confusion and uncertainty in the insurance industry, and it acknowledges both the conflict among the circuits and the public importance of this case. Far from providing a legitimate reason for denying the writ, therefore, the Brief in Opposition demonstrates why review should be granted.[3]

The need for the Court's immediate intervention is further underscored by the briefs *amicus curiae* submitted in support of the Petition by the State of New York ("NYS"), the National Association of Insurance Commissioners ("NAIC") and the American Council of Life Insurance ("ACLI").[4] These briefs establish what Harris Trust cannot seriously dispute – that the decision below will cause substantial upheaval in longstanding insurance industry practices and create dual and conflicting regulation of the business of insurance under state and federal law.

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[3] The Brief in Opposition consists almost entirely of arguments on the merits. Opp. Br. at 3-16. It mischaracterizes the facts and legal issues involved, misconstrues the statutory text and legislative history, and misinterprets the pronouncements of the Department of Labor ("DOL"). Harris Trust's legal arguments, with which Hancock of course disagrees, are more appropriately placed before the Court once certiorari is granted. Accordingly, they are not addressed in this Reply Brief.

There is one inaccuracy in the Brief in Opposition, however, that is so egregious that Hancock is constrained to respond. In the opening sentence of its Argument, Harris Trust asserts that the contract at issue, GAC 50, has "two parts" and that Hancock "admits" that one of those "parts . . . provides no guarantees." Opp. Br. at 3. GAC 50 has no "parts," as that term is used by Harris Trust; moreover, the entirety of GAC 50 provides for guaranteed benefits, because all funds held under the contract are available to be used, at Harris Trust's option, to pay such benefits. Pet. at 5-6; 21-24. Hancock has never taken any position or "admitted" anything to the contrary.

[4] References to pages of the briefs *amicus curiae* are cited as "NYS Br.", "NAIC Br." and "ACLI Br.", respectively, followed by the page number.

I.

HARRIS TRUST RECOGNIZES THAT THE SECOND CIRCUIT'S DECISION WILL SEVERELY DISRUPT THE INSURANCE INDUSTRY

In its Brief in Opposition, Harris Trust does not dispute that the Second Circuit decision has caused substantial confusion and uncertainty in the insurance industry and threatens disruption of longstanding insurance company business practices. In fact, Harris Trust recognizes that compliance with the Second Circuit's decision will require the insurance industry to "radically change" the way it handles pension funds in its operations. Opp. Br. at 17.

NYS makes clear in its *amicus* brief why the changes required by the Second Circuit's decision would be radical indeed. These changes, in the State's words,

> will interfere with the nondiscriminatory treatment of policyholders and contractholders required by State law; . . . will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State; and . . . will severely impair the administration of the insurance laws by insurance regulators.

NYS Br. at 3; *see also* NAIC Br. at 6.

Unable to deny the profound adverse effect of the decision below upon the insurance industry, Harris Trust proclaims instead that these consequences are both long overdue and, in any event, not relevant to this Court's consideration of the Petition. Opp. Br. at 16-17.[5] As the Petition and the briefs

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[5] Harris Trust suggests that the disruption to the insurance industry could be avoided through "segmentation." Opp. Br. at 19 n.17. Because segmentation is only a means of assigning assets for income allocation purposes, however, it would not address Harris Trust's purported concerns. Under Harris Trust's view, particular General Account assets must be segregated and managed solely in the interest of a particular pension plan customer.

(Footnote continued)

amicus curiae point out, however, the decision of the Second Circuit cannot be reconciled with the McCarran-Ferguson Act, the language of ERISA, the intent of Congress or the interpretation of the statute by the DOL. Pet. at 16-24.

The Second Circuit's decision will eviscerate ERISA's "guaranteed benefit policy" exception and materially undermine the national policy underlying the McCarran-Ferguson Act. This disruption of the States' regulation of the business of insurance would necessarily have a drastic impact upon the allocation of regulatory responsibilities between the federal and state governments and upon the insurance industry.[6]

II.

HARRIS TRUST ADMITS THAT THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE QUESTION PRESENTED IN THE PETITION

Harris Trust admits that, as a consequence of the decision below, there is now a conflict between "the Second and Seventh Circuits, on the one hand, and the Third Circuit, on the other hand." Opp. Br. at 20. Harris Trust asserts, however, that denial of the writ "may permit the Third Circuit to reconsider its own

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Segmentation entails no such segregation of assets. Moreover, the segregation of a portion of an insurer's General Account assets for the exclusive benefit of particular policyholders conflicts with state statutory schemes for monitoring the solvency of insurers, *e.g.*, NYS Br. at 8-11, and would therefore undermine state evaluation of insurers' solvency, *e.g.*, NYS Br. at 12 n.14. State insurance laws would also be violated if an insurer were to manage General Account assets for the exclusive benefit of only some General Account contractholders or policyholders, *e.g.*, NYS Br. at 5-8. Additionally, segregation of an insurer's General Account would massively complicate state regulation of insurance, perhaps even necessitating a two-tiered regulatory regime, *e.g.*, NYS Br. at 11-12; *see also* ACLI Br. at 13 & n.18.

[6] Citing 29 U.S.C. §§ 1108 and 1114 and a truncated excerpt from the legislative history, Harris Trust claims that administrative relief is available under ERISA from the effects of the irreconcilable conflict between federal and state law created by the decision below. Opp. Br. at 18-19. Neither section on its face, however, applies to ERISA's fiduciary responsibility provisions under 29 U.S.C. § 1104, and Harris Trust does not identify any other provision of the statute by which such relief could be obtained.

view." *Id.* The only support Harris Trust provides for that speculation is the fact that *Harris I* (A-21 to A-62), a district court opinion in this case that was cited by the Third Circuit in *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), has now been overruled in part by the Second Circuit. *Id.*

Despite the Third Circuit's reference in *Mack Boring* to *Harris I*, that court conducted its own comprehensive analysis of the language of ERISA, the statute's legislative history and the DOL's subsequent administrative interpretations. Pet. at 12-13. Furthermore, the Third Circuit considered the profound consequences of applying ERISA's fiduciary responsibility provisions to an insurance company's General Account operations. Pet. at 13. There is simply no reason to believe that, after its own careful analysis, the Third Circuit would reconsider its view in *Mack Boring* based solely upon the far more limited analysis performed by the Second Circuit.

Indeed, the likelihood of reconsideration by the Third Circuit is made even more remote by the Second Circuit's express reliance upon the opinion in *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), which was expressly rejected by the Third Circuit and was limited as a precedent by the Seventh Circuit in *Peoria Union* itself. Moreover, several district courts, both within the Third Circuit and elsewhere, have expressly relied upon *Mack Boring*'s analysis. *Bozeman v. Provident Nat'l Assurance Co.*, No. 90-2925-5 (W.D. Tenn. May 15, 1992) (WESTLAW, DCTU database) (following *Mack Boring* and rejecting *Peoria Union*); *Trustees of Laborers' Local No. 72 Pension Fund v. Nationwide Life Ins. Co.*, 783 F. Supp. 899 (D.N.J. 1992); *Fechter v. Connecticut Gen'l Life Ins. Co.*, 800 F. Supp. 182 (E.D. Pa. 1992) (decided after the Second Circuit's reversal of *Harris I*). The Second Circuit's contrary decision, however, apparently has not been followed by any other court. Review of the decision below ought not be denied based upon the remote possibility of reconsideration by the Third Circuit of its earlier comprehensive ruling.

III.

IT IS URGENT THAT THE CONFLICT AMONG THE CIRCUITS BE RESOLVED

While acknowledging the existence of a conflict among the circuits, Harris Trust makes the insupportable assertion that there is "no great urgency" in resolving that conflict. Opp. Br. at 20. The briefs *amicus curiae* refute that assertion, and it is controverted by Harris Trust's own arguments.

As the Petition points out — and Harris Trust does not dispute — the conflict among the circuits affects the management and administration of hundreds of billions of dollars of assets held in the General Accounts of insurance companies. These assets are held in connection with insurance contracts with pension plans covering almost 60 million persons. Pet. at 20. The briefs *amicus curiae* of NYS, the NAIC and the ACLI — which reflect the concern of insurance commissioners in every jurisdiction in the United States as well as of the insurance industry — underscore the urgency in resolving the conflict among the circuits and the looming conflict between federal and state law.

Harris Trust asserts that the conflict among the circuits should not result in "inconsistent obligations" for insurance companies, because "the Third Circuit, in *Mack Boring*, did not prohibit [the] treatment of 'free funds'" as plan assets. Opp. Br. at 20. Not only can that statement not be reconciled with any reasoned interpretation of the Third Circuit's decision — which holds that none of the funds held in an insurance company's General Account in connection with a guaranteed benefit policy are plan assets — it also fails to address the inability of an insurer to comply simultaneously with ERISA and state law. The *amicus* brief filed by NYS specifically identifies the "inconsistent obligations" that would be imposed on insurers as a result of the Second Circuit decision. NYS Br. at 2-3.

Harris Trust further asserts that the question presented in the Petition is one as to which "further development of the law in other circuit courts may permit a majority view to emerge, thereby clarifying the issues for review." Opp. Br. at 20. That argument is baseless. Harris Trust fails to identify any issue

presented in the Petition that would be clarified by additional lower court decisions. The conflict among the circuits on the question presented is stark and inescapable and can only be resolved by this Court.

Harris Trust's other arguments also subvert its plea for delay. In Harris Trust's view, Congress intended ERISA to supplant state regulation of insurance companies with respect to participating group annuity contracts issued to pension plans. Opp. Br. at 10. If that were the case, however, the burden of regulating the business of insurance with regard to typical General Account group annuity contracts like GAC 50 would fall squarely on the shoulders of the federal courts, a proposition that finds absolutely no support in the legislative history of ERISA. That is itself a reason why the writ should be granted.

This Court has recognized that insurance companies have a "vital" interest in being able to rely upon existing law to structure their business operations to accommodate risks over long periods of time. "Drastic changes in the legal rules governing . . . insurance funds" impair that stability and upset the premises upon which the business has been conducted. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246-47 (1978). As the briefs *amicus curiae* attest, the decision below has cast doubt upon fundamental legal principles governing the business of insurance upon which the entire industry has relied. Delaying review of the question presented in this case will only cause further confusion, uncertainty and disruption.

Conclusion

The Petition for a Writ of Certiorari should be granted.

February 22, 1993

Respectfully submitted,

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